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No. 82-1513

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,
*Appellant,*

v.

FLORIDA PUBLIC SERVICE COMMISSION and
GULF POWER COMPANY,
*Appellees.*

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**On Appeal From the Supreme Court of Florida**

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## BRIEF OPPOSING THE MOTION TO DISMISS OF GULF POWER COMPANY, AND THE MOTION TO DISMISS OR AFFIRM OF THE FLORIDA PUBLIC SERVICE COMMISSION

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# October Term, 1982

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ESCAMBIA RIVER
ELECTRIC COOPERATIVE, INC.,
Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION and
GULF POWER COMPANY,
Appellees.

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*Brief Opposing the Motion to Dismiss*
*of Gulf Power Company, and the*
*Motion to Dismiss or Affirm of*
*the Florida Public Service Commision*

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MAY IT PLEASE THE COURT:

Appellant, Escambia River Electric Cooperative, Inc., submits this Brief in Opposition to the Motion to Dismiss filed by the Appellee, Gulf Power Company, and the Motion to Dismiss or Affirm filed by the Appellee, The Florida Public Service Commission, pursuant to Rule 16.5, Rules of the Supreme Court of the United States.

# I

## ARGUMENT OPPOSING THE MOTION TO DISMISS OF GULF POWER COMPANY

Appellee, Gulf Power Company, has based its Motion to Dismiss on four separate grounds, each of which is expresssly treated hereinafter.

1. THIS APPEAL IS WITHIN THE APPELLATE JURISDICTION OF THIS COURT.

It is alleged that Appellant's jurisdictional statement is not in conformity with 28 U.S.C. §1257(2). Such argument is without merit.

Appellant has expressly cited *Atchison, Topeka, and Santa Fe Ry. Co.* vs. *Public Utilities Commission of the State of California,* 346 U.S. 346 (1953), as the authority for the appellate jurisdiction of this Court under 28 U.S.C. §1257(2). In *Atchison, supra,* this Court expressly held that the Orders of the Public Utility Commission of the State of California represent the exercise of legislative authority and are "state statutes", within the meaning of Title 28 U.S.C. 1257(2). This Court then concluded that a ruling of the highest court of the state denying review of the Orders of the Commission, issued pursuant to specific statutory authority, and challenged as violating the United States Constitution, amounted to a decision in favor of the validity of the statute upon which the Orders were based, and is properly reviewable by this Court under 28 U.S.C. 1257(2).

2. THIS APPEAL DOES PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This issue has been substantially addressed by Appellant in its jurisdictional brief. Appellee's argument that there is no substantial federal question does not comport with reason and logic. The power to regulate carries with it the power to destroy unless regulation is conducted within permissible constitutional

standards. Section 425.04, *Fla. Stat.*, provides the powers granted to cooperatives by the Florida legislature. Such statutory authority contains no provision limiting cooperatives' ability to serve any type of customer. The decision of the Florida Public Service Commision as affirmed by the Florida Supreme Court has singled out cooperatives by denying them basic and substantial fourteenth amendment rights, upon the announced policy that cooperatives are federally subsidized. Obviously, such decision presents squarely to this Court the substantial issue of a denial of federally protected rights. It is not frivolous, and such issue was presented properly and in a timely manner.

3. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS TIMELY AND PROPERLY RAISED, AND PASSED ON BY THE STATE COURT.

A certificate of the Clerk of the Florida Supreme Court certifying that the question was presented and argued appears in the appendix to this brief. A certified copy of such certificate has been forwarded by the Florida Supreme Court to the Clerk of the United States Supreme Court. An Examination of the opinion of the Supreme Court of Florida, when read in the light of the issues presented to it for determination, will reveal that the decision necessarily had to decide the federal question, thereby upholding the action of the Florida Public Service Commission in regard to Appellant's assertion that the Order was constitutionally impermissible. The necessary effect of the Order of the Florida Supreme Court is a denial of Appellant's claim of violation of fourteenth amendment rights. *New York, ex. rel. Bryant* vs. *Zimmerman,* 278 U.S. 63, 67. Further, the failure of the Florida Supreme Court to articulate its denial of the constitutional challenge is just as reviewable as an express decision on that point. *Chambers* vs. *Mississippi,* 410 U.S. 284, 290.

In *Lawrence* vs. *State Tax Commission,* 286 U.S. 276, 282-283, this Court held that an erroneous failure to pass on the federal constitutional objections to a state statute is treated by

the Court as equivalent to a finding of validity within the meaning of §1257(2), so that an appeal will lie. As long as the statute has been sustained, the Court has necessarily rejected a timely challenge on constitutional grounds. Its silence in this respect is immaterial and cannot destroy Appellant's right to appeal under §1257(2). *Lawrence* vs. *State Tax Commission, supra.* Further, the validity of a state statute has also been sustained within the meaning of §1257(2), when a state court holds the statute applicable to a particular set of facts as against a contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co.* vs. *Bondurant,* 257 U.S. 282; *Bantam Books, Inc.* vs. *Sullivan,* 372 U.S. 58, 61, n.3; *Cohen* vs. *California,* 403 U.S. 15, 17-18.

4. THE JUDGMENT THAT IS THE SUBJECT OF THIS APPEAL DOES NOT REST ON AN ADEQUATE NON-FEDERAL BASIS.

The Florida Public Service Commission resolved the territorial dispute between Appellant and the Appellee, Gulf Power Company, upon the basis of a policy favoring Gulf Power Company because of alleged preferential economic advantage given cooperatives by Congress. Appellant has asserted that such decision has no legitimate, rational, state regulatory basis, and is a denial of Appellant's fourteenth amendment rights. Clearly, any alleged preferential economic advantage given cooperatives by Congress cannot be the basis of legitimate, rational state regulation of territorial disputes, when the legitimate state regulatory purpose is the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities. §366.04(3), *Fla. Stat., Gainesville-Alachua County Regional Electric Water and Sewer Utilities Board* vs. *Clay Electric Cooperative, Inc.,* 340 So. 2d 1159 (Fla. 1976).

In order that the state decision be found to rest upon an adequate state ground, it must not be inconsistent with federal law. If a decision on the federal issue would change the outcome of the case, and the state ground is not adequate, then this Court has jurisdiction to review the case. 32A AM. JUR. *Federal Practice and Procedure* 2d §674, citing *Chicago, B. & Q. R. Co.* vs. *Illinois,* 200 U.S. 561.

## II

# ARGUMENT OPPOSING THE MOTION TO DISMISS OR AFFIRM OF THE FLORIDA PUBLIC SERVICE COMMISION

While Appellant's position is adequately set forth in its jurisdictional statement, it is desireable that a response be made to the Motion to Dismiss or Affirm filed by the Appellee, The Florida Public Service Commission. Such motion makes numerous references to the transcript (Motion pp 2-12). Interestingly, it makes no reference to the findings of fact in its Order of July 31, 1981 (App. B to Appellant's jurisdictional statement), preferring, rather, to now assert additional "facts" for consideration by this court.

Appellee, The Florida Public Service Commission, acknowledges that it found no equitable or factual distinction in favor of either utility (Motion pp 12-13), thereby resolving the dispute by a "policy" decision in favor of Appellee, Gulf Power Company (Motion pp 13). The motion then states that the Florida Public Service Commission:

> " . . . looked at the differences in the financial composition . . ." (Motion pp 13).
>
> " . . . recognized that cooperatives receive preferential income tax treatment, substantial loans and low loan interest rates . . ." (Motion pp 13).

and then stated that:

> ". . . Gulf must pay a higher interest rate for its loans . . ." (Motion pp 13).
>
> " . . . Gulf . . . must pay dividends high enough to attract customers . . ." (Motion pp 13).
>
> " . . . These higher capital costs increase (Gulf's) financial risk . . ." (Motion pp 13).

" . . . (Gulf) has higher business risk than Escambia . . ." (Motion pp 14).

" . . . These considerations are significant enough that when all other factors are equal, (Gulf) should have the ability to serve the new territory . . ." (Motion pp 14).

The assertion by Appellee, The Florida Public Service Commission, that the policy decision based upon the above "relevant" factors had a direct and rational relationship to the state's legitimate interest in assuring "an adequate and reliable source of energy for operation and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilitites", is so *underwhelming* and devoid of the rudimentary principles of logic that it actually defies one's imagination.

Can it be said that Gulf's extension of a transmission line 6.7 miles through an area historically and exclusively serving 1,102 of Escambia's customers is the avoidance of uneconomic duplication of facilities? Can it be said that the regulatory powers given to The Florida Public Service Commission to resolve territorial disputes have been exercised in a constitutionally permissible manner?

A cursory examination of the admissions and conclusions contained in the motion of the Florida Public Service Commission will reveal that the answer to each question is a resounding "no!"

## CONCLUSION

The motion of Appellee, Gulf Power Company, to dismiss Appellant's appeal, and the motion of the Appellee, The Florida Public Service Commission, to dismiss or affirm, should be denied, and probable jurisdiction noted in view of the obvious constitutional violations and the substantial nature of the issues involved.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

I, SID J. WHITE, Clerk of the Supreme Court of Florida, do hereby certify that the following issue was presented in appellant's brief in the case of *Escambia River Electric Cooperative, Inc.* vs. *Public Service Commission, et al.*, Case No. 61, 679:

**POINT II**

THE ANNOUNCED POLICY BASIS UPON WHICH PSC RENDERED ITS DECISION AMOUNTS TO AN ARBITRARY AND OPPRESSIVE EXERCISE OF GOVERNMENTAL POWER, IS CONTRARY TO THE ANNOUNCED POLICY OF THE PSC, IS CONFISCATORY OF APPELLANT'S RIGHTS, IS A DENIAL OF DUE PROCESS OF LAW, AND DENIES APPELLANT ITS RIGHT TO EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY SECTIONS 2 AND 9 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

IN WITNESS WHEREOF I have hereunto set my hand and official Seal of the Supreme Court of Florida, at Tallahassee, the Capital, this the 15th day of April, 1983.

/s/ Sid J. White

Clerk of the Supreme Court of Florida.

(seal)